



REGULATORY AGENCY ACTION

10, No. 4 (Fall 1990) p. 74 for background information.)

The consistent failure on the part of some third-party administrators to reimburse the service dealer at all for repairs under a service contract ("no pay") or extreme delay in reimbursements ("slow pay") have caused some service dealers to adopt a policy of collecting in advance from consumers who request repairs under a service contract, leaving the consumer to attempt to collect reimbursement from the third-party administrator. This practice may be in violation of the service contract held by the consumer or the service dealer's contract with the service contract administrator. At the May 17 meeting, BEAR staff again reminded service dealers that they have a duty of full and fair disclosure to the consumer. If a service dealer intends to charge the consumer for a repair under a service contract, that fact should be clearly stated to the consumer before the item is accepted for service or repair. In addition, if the consumer is to be responsible for paying the service dealer for the repair, the service dealer must comply in full with the Electronic and Appliance Repair Dealer Registration Law, including the provision of a written estimate, a claim receipt, and an itemized invoice, and the return of replaced parts.

New BEAR Chief Marty Keller expects the service contract issue to be a major project for the Bureau during the next year. He plans to conduct public hearings on the issue during the fall to determine the problems extant and the best ways of resolving them. One issue which will be developed is the potential classification of a service contract as insurance, such that the state Department of Insurance would take jurisdiction over third-party administrators.

BEAR Resubmits Rulemaking Package. On February 25, the Office of Administrative Law (OAL) disapproved BEAR's proposed rulemaking package which consisted of modifications and additions to twelve sections of Division 27, Title 16 of the CCR. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 72; Vol. 11, No. 1 (Winter 1991) p. 60; and Vol. 10, No. 4 (Fall 1990) p. 73 for detailed background information.) OAL determined that the proposed regulations did not meet the necessity, consistency, and clarity standards of Government Code section 11349.1. According to BEAR Program Manager George Busman, the Bureau made the changes necessary to comply with section 11349.1, including the deletion of the proposed amendments to sections 2710 and 2717, and resubmitted the proposed regulatory

package to OAL on May 16. At this writing, BEAR is awaiting OAL's approval.

Cyclical Renewal. In February, BEAR developed a proposed fee schedule to phase in a cyclical renewal system for Bureau registrations. Currently, all BEAR registrations must be renewed on June 30, the end of the state's fiscal year. Under a cyclical renewal system, registration would be renewed one year from the date of original issuance; the benefit of such a system is a more efficiently distributed workload for the Bureau. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 73 for background information.) The proposal has been included in the Department of Consumer Affairs' omnibus bill (AB 1893); if the bill is enacted, the cyclical system should become effective January 1, 1992. (See *infra* LEGISLATION.)

Technician Registration/Certification. At the Advisory Board's May 17 meeting, George Brownyard of the California State Electronic Association (CSEA) updated the Board on CSEA's continuing attempt to draft and sponsor legislation authorizing BEAR to test and certify or register service technicians. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) pp. 88-89; Vol. 10, No. 1 (Winter 1990) p. 67; and Vol. 9, No. 4 (Fall 1989) p. 56 for background information.) Mr. Brownyard indicated that there is national interest in this proposal, and that other states are looking to California as a role model for electronic and appliance technician licensing. He indicated he is still gathering statistics and completing DCA's "sunrise questionnaire" which is required before DCA will consider the addition of a new licensing program.

LEGISLATION:

AB 1893 (Lancaster), as amended May 24, would revise the issue, expiration, and renewal dates for BEAR registrations (see *supra* MAJOR PROJECTS). This bill is pending in the Assembly Ways and Means Committee.

SB 101 (Lockyer), reported in CRLR Vol. 11, No. 2 (Spring 1991) at page 73, was substantially amended in June and is no longer relevant to BEAR.

RECENT MEETINGS:

At the April 23 meeting of BEAR's Executive Committee, then-Chief Jack Hayes reported that he plans to write an article for publication in computer periodicals advising computer repair dealers of their responsibility to register with BEAR.

At the Advisory Board's May 17 meeting, new DCA Director Jim Conran

and Deputy Director Tom Maddock were on hand to introduce themselves and discuss the new direction of DCA. Conran stated that two principles will be guiding him as DCA Director—protection of consumers from those who would victimize them, and the provision of a wide range of marketplace choices to consumers. He further stated that under his leadership, DCA will have a strong enforcement program, and urged those in state government to be responsive to consumer complaints.

At the Advisory Board's May 17 meeting, retiring Chief Jack Hayes was presented with several plaques and cakes in appreciation for his 25 years with the Bureau. Hayes is retiring effective July 2, and has spent the past 17 years as BEAR Chief. New Bureau Chief Marty Keller took over after the May 17 meeting; new Deputy Chief Curt Augustine is expected to join BEAR on July 2.

FUTURE MEETINGS:

October 4 in Sacramento.

BOARD OF FUNERAL DIRECTORS AND EMBALMERS

*Executive Officer: James B. Allen
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The Board of Funeral Directors and Embalmers licenses funeral establishments and embalmers. It registers apprentice embalmers and approves funeral establishments for apprenticeship training. The Board annually accredits embalming schools and administers licensing examinations. The Board inspects the physical and sanitary conditions in funeral establishments, enforces price disclosure laws, and approves changes in business name or location. The Board also audits preneed funeral trust accounts maintained by its licensees, which is statutorily mandated prior to transfer or cancellation of a license. Finally, the Board investigates, mediates, and resolves consumer complaints.

The Board is authorized under Business and Professions Code section 7600 *et seq.* The Board consists of five members: two Board licensees and three public members. In carrying out its primary responsibilities, the Board is empowered to adopt and enforce reasonably necessary rules and regulations; these regulations are codified in Division 12, Title 16 of the California Code of Regulations (CCR).

MAJOR PROJECTS:

Proposed Regulatory Changes. On March 28, the Board held another public



hearing on its proposed amendments to section 1257, Title 16 of the CCR, which would increase the various licensing fees of embalmers and funeral directors to the statutory maximum. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 74; Vol. 11, No. 1 (Winter 1991) p. 61; and Vol. 10, No. 4 (Fall 1990) p. 75 for background information.) Since the regulatory proposal's notice in early December, it has received a significant amount of opposition from the industry. Numerous industry members question the need for the increase in fees, and are distressed and angered by the enormous increase in fees called for by the proposal. Due to the continued industry opposition, the Board took no action on the proposal, and continued the matter until its May 23 meeting in San Francisco. At the May 23 meeting, the Board adopted the proposed amendments to section 1257 with only one modification affecting the proposed embalmer's licensing renewal fee.

At this writing, the Board has completed the rulemaking file on proposed section 1259, Title 16 of the CCR, which was adopted by the Board on January 24. The new section would convert the Board's present annual license renewal schedule to an anniversary date renewal schedule. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 74; Vol. 11, No. 1 (Winter 1991) p. 61; and Vol. 10, No. 4 (Fall 1990) p. 75 for background information.) When the rulemaking file on section 1257 is complete, the Board will submit both packages to the Office of Administrative Law for approval.

LEGISLATION:

The following is a status update on bills reported in detail in CRLR Vol. 11, No. 2 (Spring 1991) at page 74:

SB 637 (Roberti), as amended April 30, would require, on and after July 1, 1995, that an applicant for licensure as an embalmer submit evidence to the Board that he/she has attained an associate of arts degree, an associate of science degree, or an equivalent level of higher education; require that such applicants complete a course of instruction of not less than one academic year in a Board-approved embalming school; authorize the Board to require such applicants to pass the National Board exam, a test administered by the Conference of Funeral Service Examining Board; and require the Board to adopt regulations requiring continuing education of licensed embalmers. This bill passed the Senate on May 23 and is pending in the Assembly Committee on Consumer Protection, Governmental Efficiency, and Economic Development.

AB 1540 (Speier), as introduced March 7, would repeal the enabling statutes of the Board of Funeral Direc-

tors and Embalmers and the Cemetery Board, and enact the Cemeteries, Funeral Directors and Embalmers Act, with unspecified contents. This bill is also pending in the Assembly Consumer Protection Committee.

AB 1981 (Elder), as amended May 2, would, commencing July 1, 1992, require any person employed by, or an agent of, a funeral director who consults with a family of a deceased person or its representatives concerning the arranging of funeral services to be licensed by the Board as an arrangement counselor, or to be designated as an arrangement counselor trainee; and set forth qualification and licensure requirements for an arrangement counselor's license. However, this bill would exempt from the examination requirement persons who have been performing the duties of an arrangement counselor for a licensed funeral director for two consecutive years or five of the last ten years immediately prior to July 1, 1992; the bill would also exempt from its requirements preneed arrangement counselors. This bill is pending on the Assembly floor.

LITIGATION:

The lawsuit filed against the Board by Funeral Security Plans, Inc. (FSP) (No. 512564, Sacramento County Superior Court), alleging that the Board violated the Bagley-Keene Open Meeting Act (Act), Government Code section 11120 *et seq.*, was decided on April 24 in favor of the Board on all counts. However, because the court found some merit to FSP's allegations, the Board was not awarded attorneys' fees or costs. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 74; Vol. 11, No. 1 (Winter 1991) p. 62; and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) pp. 90-91 for background information.)

The major issue in this litigation concerned the scope of the Act's "pending litigation" exception (Government Code section 11126(q)). FSP acknowledged that section 11126(q) permits the Board to go into closed session to confer with or receive advice from legal counsel regarding pending litigation, but argued that Board members may not deliberate among themselves during the closed session with respect to accepting or rejecting the advice, and that the Board's counsel and/or staff members are precluded from presenting previously undisclosed factual information during "pending litigation" closed sessions. FSP contended that both the scope and source of the Board's authority to meet privately with legal counsel on pending litigation are contained in section 11126(q) exclusively, and may not be enlarged by reference to traditional concepts of the attorney-client privilege.

The court rejected this argument, finding that the "legislative history shows that the lawmakers were concerned not with gutting the attorney-client privilege itself for government attorneys and their clients...but simply with defining the circumstances under which they may meet privately." The court concluded that once the pending litigation exception has been lawfully invoked, the Board and its attorneys may look to traditional concepts of the attorney-client privilege to define the scope of their confidential communication.

FSP also alleged that Board staff members violated the Act by delivering new facts by mail or telephone to individual Board members in advance of scheduled meetings. The court found no violation of the Bagley-Keene Act, since "there is no evidence that any of the individual communications in this case were devices to avoid what would otherwise have to be publicly conducted business." The court noted that such communications would violate the Act when they serve as a substitute for a meeting.

FSP also attacked the Board's procedures for disciplining licensees under the Administrative Procedure Act, Government Code section 11500 *et seq.*, alleging, among other things, that while the Board may "deliberate" on proposed disciplinary decisions privately under Government Code section 11126(d), it must "take action" at a public session, and that the practice of voting on these matters by mail-in ballot is not authorized by Government Code section 11526. The court rejected both arguments, finding that the reasonable meaning of section 11126(d) permits both deliberation and the decision itself to be made in closed session. Regarding the mail-in ballot, the court noted that Government Code section 11526 specifically permits agency members to vote by mail; since section 11126(d) authorizes the Board to take private action on these matters, the court found that section 11526 is not being used as a device to avoid an open meeting.

Finally, FSP complained that Board advisory committees composed of two Board members—usually exempt from the Bagley-Keene Act under Government Code section 11121.8—become "state bodies" subject to the Act once they are joined by staff members who become an integral part of the committee and/or if they exercise factfinding authority delegated by the Board. Although the court could have properly rejected FSP's contention based on Government Code section 11121.8, it recognized an "overriding principle" which it extrapolated from the Brown Act applicable to local agencies and allowed to



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supersede the Bagley-Keene Act. One provision of the Brown Act, Government Code section 54952.3, states that the term "legislative body" does not include "a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body"—an exception which has come to be known as the "less than a quorum" exception. The Bagley-Keene Act has no corresponding provision. Although section 11121.8 of the Bagley-Keene Act applicable to the Funeral Board permits two-member committees to meet in private by providing that only an advisory committee consisting of "three or more persons" created by the Board is a "state body" subject to the Act, the court applied the "less than a quorum" exception. Relying on a 1989 open meetings brochure prepared by the Attorney General's Office, the court found that the exception "has been applied administratively for many years to state agencies operating under the Bagley-Keene Act..." and rejected FSP's final claim. FSP plans to appeal this ruling.

In another case, the court has scheduled a hearing date on the Board's motion for permanent injunction against FSP for alleged violations of preneed reporting laws (No. 205308, Riverside County Superior Court). (See CRLR Vol. 11, No. 2 (Spring 1991) pp. 74-75 for background information on the issuance of the preliminary injunction in this proceeding.) The permanent injunction hearing is scheduled for the first three weeks in September.

At this writing, the California Supreme Court has yet to schedule oral argument in *Christensen, et al. v. Superior Court*, No. S016890. The Supreme Court granted the request for review by real party in interest Pasadena Crematorium, and will examine the Second District Court of Appeal's June 1990 decision which substantially expanded the plaintiff class in this multimillion-dollar tort action against several Board licensees. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 75; Vol. 11, No. 1 (Winter 1991) p. 62; and Vol. 10, No. 4 (Fall 1990) pp. 61 and 75 for background information.)

On April 4, Ventura County Superior Court Judge Frederick Jones dismissed a murder charge against David Wayne Sconce, who operated Pasadena Crematorium and Lamb Funeral Home in Pasadena. Sconce had been charged with the murder of Timothy Waters, a rival mortician; prosecutors had alleged that Sconce slipped Waters a lethal dose of oleander to keep him from revealing illegal goings-on at Sconce's establishments. However, prosecutors subse-

quently conceded that new scientific tests showed no trace of poison from the oleander plant in Waters' exhumed remains. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 62 for background information.)

RECENT MEETINGS:

At its March 28 meeting, the Board addressed complaints which it has received over the past few years concerning unlicensed individuals who provide mortuary accommodation and transportation services. The Board considered the possibility of requiring these individuals to be separately licensed by the state, but instead decided to contact such unlicensed businesses and direct them to cease and desist from the unlicensed practice. Board counsel Robert Miller reminded the Board that it has the authority to adopt regulations that would allow the Board's Executive Officer to issue citations and assess fines against unlicensed businesses performing acts for which a license is required.

Also at its March 28 meeting, the Board approved in concept a proposal from the National Funeral Directors Association regarding mutual aid agreements, which would allow licensed funeral directors from one state to work in another state in times of disaster. Under such agreements, in the event of a major disaster or emergency where human death is likely to occur, persons licensed by either reciprocal state as a funeral director or embalmer would be temporarily authorized to practice funeral directing and/or embalming in a reciprocal state where they are not so licensed, provided that such services are rendered as a member of a "Disaster Mortuary Team" authorized by local or federal authorities to provide such services. However, only funeral directors and/or embalmers licensed in the state where the disaster or emergency has occurred would be able to sign death certificates. It is anticipated that California will enter into mutual aid agreements with its neighboring states.

FUTURE MEETINGS:

September 26 in Eureka.

November 21 in Brea.

BOARD OF REGISTRATION FOR GEOLOGISTS AND GEOPHYSICISTS

*Executive Officer: Frank Dellechiaie
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The Board of Registration for Geologists and Geophysicists (BRGG) is mandated by the Geology Act, Business and

Professions Code section 7800 *et seq.* The Board was created by AB 600 (Ketchum) in 1969; its jurisdiction was extended to include geophysicists in 1972. The Board's regulations are found in Division 29, Title 16 of the California Code of Regulations (CCR).

The Board licenses geologists and geophysicists and certifies engineering geologists. In addition to successfully passing the Board's written examination, an applicant must have fulfilled specified undergraduate educational requirements and have the equivalent of seven years of relevant professional experience. The experience requirement may be satisfied by a combination of academic work at a school with a Board-approved program in geology or geophysics, and qualifying professional experience. However, credit for undergraduate study, graduate study, and teaching, whether taken individually or in combination, cannot exceed a total of four years toward meeting the requirement of seven years of professional geological or geophysical work.

The Board may issue a certificate of registration as a geologist or geophysicist without a written examination to any person holding an equivalent registration issued by any state or country, provided that the applicant's qualifications meet all other requirements and rules established by the Board.

The Board has the power to investigate and discipline licensees who act in violation of the Board's licensing statutes. The Board may issue a citation to licensees or unlicensed persons for violations of Board rules. These citations may be accompanied by an administrative fine of up to \$2,500.

The eight-member Board is composed of five public members, two geologists, and one geophysicist. BRGG's staff consists of two full-time employees (Executive Officer Frank Dellechiaie and his secretary) and two part-time personnel. The Board's committees include the Professional Practices, Legislative, and Examination Committees. BRGG is funded by the fees it generates. Currently, two public member positions on BRGG are vacant.

MAJOR PROJECTS:

BRGG Considers Draft Regulatory Amendments. At its April 16 meeting, the Board discussed draft changes to sections 3005, 3025, 3036, and 3037, Division 29, Title 16 of the CCR. The changes would increase the Board's revenue and hopefully enable it to administer its licensing exams twice per year—a